No. 90-1787

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In the Matter of the Application of The LUDLOW PARK HOMEOWNERS ASSOCIATION, INC., HENRY SPALLONE as Mayor of the City of Yonkers, and G. OLIVER KOPPELL, as Assemblyman for the 80th Assembly District,

Petitioners,

- against -

THE COUNTY OF WESTCHESTER and the WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents,

UNITED STATES OF AMERICA and STATE OF NEW YORK,

Intervening-Respondents,

for an order pursuant to CPLR Article 78 reversing and annulling the determination of the respondents to the effect that an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Admitted to the Bar of the Supreme Court of the United States on May 13, 1991

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Of Counsel

Petitioner respectfully petitions for a Writ of certiorari to review the final judgment in the proceeding which was affirmed by the United States Court of Appeals for the Second Circuit on February 19, 1991. The order of the Court of Appeals is attached hereto as Appendix A. The District Court's order and judgment are attached as Appendix B.

QUESTIONS PRESENTED:

1. Does the All Writs Act [28 U.S.C. §1651(a)][1] confer subject matter jurisdiction upon the United States District Court over a proceeding commenced in New York State court to review the administrative determination of a local agency under the New York State Environmental Conservation Law where, as a matter of law, no Federal concern could be, or was, considered in determining the merits of the proceeding?

2. Did the application of the All Writs Act as the basis for subject matter jurisdiction in this proceeding violate the United States Constitution [Section 2, Article III]?[2]

[1] 28 U.S.C. §1651(a) provides as follows:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[2] Section 2, Article III of the Constitution provides as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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BASIS FOR JURISDICTION

Petitioners-appellants urge that the Court has jurisdiction to entertain this petition pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 2, Article III, of the Constitution defines the judicial power of the United States.

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

The Yonkers Joint Sewage Treatment Plant ("YJSTP") is a large secondary sewage treatment plant on the Hudson River in Southwest Yonkers. Storm, residential and industrial sewage generated by 65% of Westchester County are treated by the plant, which lies immediately adjacent (except for the width of four railroad tracks) to residential neighborhoods.

Under compulsion embodied in a Federal Consent Decree between Westchester County, New York State and the Federal government for cessation of ocean dumping of sludge produced by the YJSTP, Westchester County proposed the construction of a $20 million sludge dewatering plant within the YJSTP. Westchester County's Department of Environmental Facilities applied to the Westchester County Board of Legislators, acting as an administrative agency, for a determination that the proposed sludge dewatering plant would have no significant environmental impact, in order to avoid the requirement of preparing an environmental impact statement under New York law.

The Westchester County Board of Legislators, acting administratively under the New York Environmental Conservation Law, determined that the proposed construction of a dewatering facility within the YJSTP would not have any significant environmental impacts. Petitioners-appellants, an incorporated home-owner's association and public officials representing the proceeding" under the New York Civil Practice Law and Rules to review and annul the administrative decision.

The proceeding was instituted in the New York State Supreme Court and removed by Westchester County to the

District Court for the Southern District of New York under 28 U.S.C. §1441. At the initial conference before United States District Judge Whitman Knapp, appellants advised the court of their intention to move to remand and the intervening respondents advised of their intention to move to retain the proceeding in the District Court under the "All Writs Act". Thereafter, a motion was made by the intervening respondents to retain jurisdiction under the "All Writs Act" and appellants cross-moved to remand. Judge Knapp granted the motion to retain jurisdiction under the "All Writs Act" and denied the remand motion as moot. After Judge Knapp determined that the District Court would retain jurisdiction, he upheld the determination of the Board of Legislators on the merits, and petitioners-appellants appealed to the Court of Appeals for the Second Circuit. The Court of Appeals for the Second Circuit affirmed, in its order dated February 19, 1991.

REASONS FOR GRANTING THE WRIT

Petitioners-appellants submit that the courts below misapplied the "All Writs Act" and transgressed the Constitutional limits of Federal jurisdiction.[3]

I. THE ALL WRITS ACT DOES NOT CONFER SUBJECT MATTER JURISDICTION OVER THE PROCEEDING

The authority of a United States District Court under the "All Writs Act" is reserved for extraordinary instances in which a party is engaged in conduct which threatens to

"... frustrate the implementation of a court order..."

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[3] While petitioners-appellants do not propose for review the lower courts' determination on the merits [i.e. that the Board of Legislators' administrative determination that an environmental impact statement was unnecessary], the determination was, it is submitted, certainly incorrect. Among other reasons, the sludge dewatering plant is a "Type I" project (under definitions in the New York Environmental Conservation Law, and rules) within a legislatively-declared environmentally sensitive area, and New York law nearly commands that an environmental impact statement be prepared in such an instance. See: Tehan v. Scrivani, 97 A.D.2d 769, 468 N.Y.S.2d 402 (2d Dept. 1983); Inland Vale Farm Co. v. Stergianopolis, 65 N.Y.2d 718, 492 N.Y.S.2d 7, 481 N.E. 2d 547 (1985).

United States v. New York Telephone Co., 434 U.S. 159, 174 (1977). Federal courts have invoked the "All Writs Act" to assume jurisdiction over State litigation, or to enjoin State litigation, when the possible outcome was seen as directly, and necessarily, impairing the terms of a standing Federal order. Thus, in Yonkers Racing Corp. v. City of Yonkers, 858 F. 2d 855 (2d Cir. 1988), cert. denied 109 S.Ct. 1527 (1989), the relief sought in the State litigation—an injunction preventing municipal condemnation of properties for construction of low-income housing—directly contravened a District Court order commanding the municipality specifically to condemn the very properties whose owners were seeking to prevent condemnation by a countervailing State court injunction. Finding that the circumstances presented were "exceptional" (858 F.2d, at 864) and that the State litigation went "to the very essence" of a District Court order, the Court of Appeals affirmed an injunction under the All Writs Act. See also: In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985); United States v. International Brotherhood of Teamsters, 728 F.Supp. 1032 (S.D.N.Y. 1990) Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383 (4th Cir. 1974); Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986).

Here, the "All Writs Act" was misapplied because the outcome of this proceeding posed no threat to the implementation of the Consent Decree and because no Federal concern could be considered in determining the merits. The Federal Consent Decree involved in this case provides that

> "This Decree and Agreement in no way affects or relieves the defendant of responsibility to comply with any ... State or local law or regulation." (Emphasis supplied.).

Even taken alone, this provision of the Consent Decree negates any assertion that litigation designed to enforce compliance with the New York State Environmental Conservation Law could "frustrate" the Consent Decree. Very much to the contrary, in view of the Consent Decree's express affirmation of Westchester County's need to comply with State law, the Article 78 proceeding must be seen as being in harmony with the Consent Decree, not as in frustration of it.

The lower courts' rulings that this proceeding threatened to "frustrate" the Consent Decree appears all the more incorrect in light of the Decree's force majeure clause, which relieves the County of default in the event of

> "... an event ... including but not limited to a judicial injunction issued by a court of competent jurisdiction ... beyond the control of the defendant..."

The combined effect of the provision affirming the County's need to comply with State law and the force majeure clause is to make clear that the Article 78 proceeding does not "frustrate" the terms of the Consent Decree but, rather, is an eventuality fully contemplated, and accounted for, in the Consent Decree. And even further, the Consent Decree authorizes a special master to entertain requests for modification of time deadlines, incorporating the provisions of Rule 60(b) Fed. R. Civ. P. which affords the Court broad discretion to modify the Consent Decree. Thus, even if it were not clear that the very terms of the Consent Decree expressly accommodate the prosecution of the Article 78 proceeding, the provisions for modification serve greatly to soften the impact of the Article 78 proceeding on the Consent Decree, certainly to the point that it becomes difficult to characterize the impact of the Article 78 proceeding as "frustrating" the terms of the Consent Decree.

Submittedly, the prerequisite for "All Writs Act" jurisdiction is a supportable finding that the outcome of the proceeding should be, and in the District Court would be, affected by Federal considerations inherent in the Consent Decree. But New York law does not permit such considerations to intrude in the determination to be made in this proceeding as to whether the proposed facility will have significant environmental impact. The District Court, in deciding the merits of the proceeding, affirmed that it could not and did not apply considerations which differed from those the State court would have been bound to apply. Neither the appellees, intervenors, nor the District Court suggested any Federal concern which should affect the outcome of this proceeding and which would have justified the District Court's preemption of the State

court's jurisdiction. Indeed, it was conceded below by the parties that the assumption of jurisdiction under the All Writs Act could not affect the determination on the merits and that the District Court was bound to apply the same considerations on the merits as the State court would have applied.

Accordingly, the assumption of jurisdiction was not authorized by the All Writs Act because neither the maintenance nor the outcome of the proceeding "threatened the implementation" [U.S. v. N.Y. Telephone Co.., supra] of the Consent Decree.

II. THE EXERCISE OF SUBJECT MATTER JURISDICTION IN THIS CASE WAS UNCONSTITUTIONAL

The Constitutionality of the "All Writs Act" on its face as an aid to Federal jurisdiction is not questioned. However, because of the important principles of Federalism embodied in Section 2, Article III of the Constitution, the Constitutional application of the All Writs Act must be reserved for instances in which a State court proceeding threatens substantially to impair some Federal action and, therefore, where some Federal interest may properly be weighed in determining the merits. Without a Federal concern which can be considered in determining the merits of this proceeding, there was no justification for usurping the State court's jurisdiction.[4] To invoke the "All Writs Act" to assume jurisdiction over a State court proceeding in which no Federal concern can affect the merits is, definitionally, in violation of the Constitutional limits of Federal jurisdiction.

Petitioners-appellants submit that this case presents an opportunity for this Court to pronounce the appropriate limits of Federal Court jurisdiction under the "All Writs Act".

CONCLUSION

The petition should be granted.

May 13, 1991

Edward P. Borrelli

EDWARD P. BORRELLI

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[4] It would well be argued that there must be an "outcome-determinative" Federal concern to support jurisdiction under the All Writs Act.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of , one thousand nine hundred and ninety one.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. ROGER J. MINER,
HON. J. DANIEL MAHONEY,
Circuit Judges.

In the matter of the application of the LUDLOW PARK HOMEOWNERS ASSOCIATION, INC.; HENRY SPALLONE, as Mayor of the City of Yonkers; G. OLIVER KOPPELL, as Assemblyman for the 80th Assembly District,

Petitioners-Appellants,

v.

ORDER
90-6247

THE COUNTY OF WESTCHESTER and WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents-Appellees,

UNITED STATES OF AMERICA
and STATE OF NEW YORK,

Intervening-Respondents,

for an order pursuant to PLR Article 78 reversing and annulling the determination of the respondents to the effect that an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

UPON CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Southern District of New York (Knapp, J.), it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is affirmed.

Petitioners-appellants Ludlow Park Homeowners Association, Inc., Henry Spallone, and G. Oliver Koppell appeal from a judgment entered in the district court dismissing their petition brought under Article 78 of the New York Civil Practice Law and Rules ("CPLR") for review of an environmental decision. Appellants also appeal from Judge Knapp's judgment in a related case, United States and State of New York v. County of Westchester, et al., 89 Civ. 5274 (S.D.N.Y. May 24, 1990), granting the motion of the United States brought under the All Writs Act, 28 U.S.C. s1651(a), for the district court to retain jurisdiction over the petition.

Appellants are a homeowners' association, composed of residents of the area adjacent to the Yonkers Joint Wastewater Treatment Plant ("YJWTP"), and two public officials. On March 22, 1990, appellants commenced this Article 78 proceeding in the Supreme Court of New York, County of Westchester, to annul an administrative decision made by the Board of Legislators of the County of Westchester (the "County") under the New York State Environmental Quality Review Act ("SEQRA"). The County decided that a full Environmental Impact Statement ("EIS") was not required before the start of construction of a sludge dewatering facility to be built inside the existing Chlorine and Maintenance Building at the YJWTP. Accordingly, the County issued a "negative declaration" determining that the proposed action would not have any significant impact on the environment.

The proceeding was removed by appellees to the district court pursuant to 28 U.S.C. s1441. The appellants advised the court that they intended to move for a remand. The United States intervened for the purpose of retaining the case in federal court. It sought the issuance of an order under the All Writs Act ("All Writs Order") preventing state court litigation from interfering with the implementation of a federal consent decree that had been entered into in August, 1989 by the County and the

United States. Under the consent decree, the County was required to phase out by December 31, 1991 the dumping of its sewage sludge into the ocean and to implement both interim and long-term plans for land-based disposal of the sludge. The United States contended that the relief sought by apellants would prevent the County from meeting its obligations under the consent decree. On May 24, 1990, the district court issued the All Writs Order and dismissed appellants' petition.

Under the All Writs Act, a federal court may issue an order "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). We may only reverse a decision to issue an order under that Act if we find that the district court abused its discretion in reaching that decision. Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942). Here, we believe that the district court did not abuse its discretion in issuing the All Writs Order to prevent interference with the 1989 consent decree. The record indicates that the lengthy process involved in producing an EIS would result in substantial delay, preventing the County from complying with the series of interrelated milestone events established by the consent decree to complete the phase-out of ocean dumping.

Appellants contend that the consent decree does not relieve the County of responsibility to comply with local law, and therefore the Article 78 proceeding in state court would not frustrate the purposes of the consent decree. However, if the state court were to find that the County's negative declaration was invalid, construction of the dewatering facility would be delayed, making it likely that the County would not meet the deadline provided in the consent decree. A remand to state court would threaten the "very essence" of the consent decree—the cessation of ocean dumping of sewage from the Westchester treatment plant by December, 1991. See Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 865 (2d Cir. 1988), cert. denied 109 S. CT. 1527 (1989).

Appellants argue that the negative declaration is deficient because it is not based on an adequate evaluation of environmental considerations and that the County failed to take a

"hard look" at the findings submitted by its consultants. In reviewing the SEQRA determinations that resulted in a negative declaration, a court may only consider "whether [the] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Chinese Staff & Workers Ass'n. v. City of New York, 68 N.Y.2d 359, 502 N.E.2d 176, 178, 509 N.Y.S.2d 499, 501 (1986) (citation omitted). The County may rely upon advice received from consultants if reliance is reasonable and there is no reason to doubt the reliability of the consultants. Stewart Park & Reserve Coalition vs. New York State Dept. of Trans., 157 A.D.2d 1, 7, 555 N.Y.S.2d 481, 484 (3d Dept. 1990). Appellants have provided no evidence that the consultant firm's work for the County was unreliable or that reliance by the County was unreasonable, and thus we reject this contention. Similarly, although the dewatering facility project is of the type that typically requires an EIS, see 6 N.Y.C.R.R. s617.12, none is required here because the County's conclusion that the project would have no significant impact on the environment is rational and supported by the record. See United Petroleum Assn., Inc. v. Williams, 65 N.Y.2d 708, 481 N.E.2d 567, 492 N.Y.S.2d 27 (1985), aff'g on opn. below, 102 A.D.2d 491, 478 N.Y.S.2d 125 (3d Dept. 1984).

We have examined appellants' remaining contentions and find them to be without merit.

ELLSWORTH A. VAN GRAAFEILAND,

ROGER J. MINER,

J. DANIEL MAHONEY,

Circuit Judges.

N.B. This summary order will not be published in the federal reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of the LUDLOW PARK HOMEOWNERS ASSOCIATION, HENRY SPALLONE as Mayor of the City of Yonkers, and G. OLIVER KOPPELL, as Assemblyman for the 80th Assembly District,

Petitioners,

-against-

THE COUNTY OF WESTCHESTER and THE WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents,

for an order pursuant to PLR Article 78 reversing and annulling the determination of the respondents to the effect than an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

MEMORANDUM & ORDER
90 Civ. 2543 (WK)

WHITMAN KNAPP, U.S.D.J.

Petitioners the Ludlow Park Homeowners Association, Henry Spallone and G. Oliver Koppell seek a judgment pursuant to C.P.L.R. Article 78 and the State Environmental Quality Review Act ("SEGRA") reversing a determination by respondents the County of Westchester and the Westchester County Board of Legislators. For reasons which follow, we deny the petition.

BACKGROUND

The Ocean Dumping Ban Act of 1988 forbids ocean dumping of sewage sludge after December 31, 1991. In 1989, the United States and the State of New York brought suit against the County of Westchester and the Westchester County Department of Environmental Facilities, seeking to ensure that the County would comply with that statute. The action was resolved by a consent decree[5] establishing a timetable for the

[5] United States v. County of Westchester, No. 89 Civ. 5274 (WK), September 6, 1989

County's development of alternative means for disposing of its waste in accordance with the law.

The Yonkers Joint Wastewater Treatment Plant, which the County has operated since 1955, each day produces approximately 1,350 tons of liquid sewage sludge, which is dumped into the ocean. Such dumping will, under the terms of the statute, become unlawful unless discontinued on or before December 31, 1991. Under this consent decree, the County must, by that date, construct a "dewatering" facility[6] capable of transforming the liquid sewage sludge into "sludge cake," which can be disposed of on land.

In June 1989, the County hired Blasland & Bouck Engineers, P.C., an engineering consulting firm, to evaluate various methods for transporting the liquid sewage sludge from the YJWTP to such a dewatering facility and to identify possible sites for that facility. After assessing the relative environmental risks, cost-effectiveness and feasibility of several means of transporting liquid sewage sludge, the engineers concluded that the sludge might be transported by pipeline or by barge, but that the farther the liquid sewage sludge was transported the greater the risk of an accidental spill. With this in mind, the engineers identified twenty possible sites and rated them according to the following criteria: (1) distance the liquid sewage sludge would have to be transported, (2) distance to the nearest park, recreational area, cultural or archaeological resource, (3) distance to the nearest incompatible land use (i.e., school, hospital, day-care facility), (4) impact on local traffic, (5) distance to the nearest residential area, (6) impact on ambient area quality, (7) impact on ambient air quality, (8) visual impact, (9) method by which the liquid sewage sludge would have to be transported, (10) site preparation required, (11) site topography and (12) whether the site was publicly or privately owned. Based on those criteria, they narrowed their investigation to what they determined were the eleven best sites.

Then, the engineers conducted a detailed comparative analysis of how the facility would be constructed and operated

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[6] A "dewatering" facility uses centrifuges to extract water from liquied sewage sludge. The resulting "dewatered" sludge is known as "sludge cake." The contaminated water extracted is known as "centrate."

at each of those sites. Since the centrate generated at the dewatering facility would have to be further processed at the dewatering facility would have to be further processed at the YJWTP, this stage of the engineers' analysis took into account, in addition to the above-listed criteria, how the centrate would be transported back to YJWTP. The report concluded that the best option would be to construct a 30' x 50' addition to the YJWTP. Among the advantages of building the facility as an addition to the YJWTP, rather than at a different site, were the elimination of environmental risks that would have accompanied transporting liquid sewage sludge from and centrate back to the YJWTP and the low relative cost of constructing and operating the facility there.

Pursuant to 6 NYCRR §617.5(b), the engineers went on to complete a Full Environmental Assessment of the environmental effects of locating the dewatering facility at YJWTP. The YJWTP is situated alongside MetroNorth railroad tracks. Across the tracks lies a residential area known as Ludlow Park. As the Environmental Assessment noted, that area has been designated a "critical environmental area, Type I" pursuant to 6 NYCRR ss617.11. After examining any effects the proposed facility would have on land, water, air, plant and animal life, agricultural, aesthetic, historical and archaeological resources, recreational areas, and character of the surrounding neighborhood, the engineers environment" and recommend that the County issue, pursuant to E.C.L. §8-0109, a negative declaration stating that no environmental impact statement was called for.

On January 17, 1990, the engineers' study, the Full Environmental Assessment and supporting documentation were submitted to the Westchester County Board of Legislators. On January 29, the Board's Committee on Budget and Appropriations conducted an open hearing, at which one of the consulting engineers discussed the study and answered the Committee's questions. The next day, the full Board held another open hearing. Present were thirteen of the seventeen members of the Board and approximately 100 residents and representatives of the media. At that hearing, the consulting engineer described the procedures used and recommendations

made in the study. The Board also heard comments from some of the residents.[7]

On February 1, the Committee recommended to the Board that it find that the proposed facility would not have a significant effect on the environment and issue a negative declaration. The Committee report stated that its recommendation was based on, inter alia, information gathered in the engineers' study, the Full Environmental Assessment, the hearings and a review of the criteria listed in NYCRR §617.11.

On February 5, the Board issued a resolution reciting that "the County must now proceed with the preparations for implementing a dewatering facility, while it simultaneously investigates substitute methods, in order to meet the milestone deadlines set forth in the consent decree and avoid monetary penalties that could be imposed for failure to meet those

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[7] On the basis of a resident's observations at the meeting, petitioners assert that several of the Board members declared that they had not reviewed the engineers' rep or the Full Environmental Assessment. Even if such an assertion were relevant to our review, we would conclude, based on the following exchange at oral argument, that the particular assertion here put forward is too flimsy to credit.

MR. ZURHELLEN [For petitioners]: ... [T]here was a meeting in our neighborhood among I think all the members or most of the members of the committee and this person, Mr. Feinstein, asked them whether they had even read the two books worth of documents that were submitted by county, and only two of the fourteen or fifteen people there said they had. The others did not.

THE COURT: Did the others say they hadn't or just made no answer?

(Pause)

THE COURT: Off the record.

(Discussion off the record) [with Mr. Feinstein]

THE COURT: We will put on the record that the gentlemen in the audience said he was there at the meeting and most of them just kind of shook their heads, I couldn't make out whether they were annoyed at the question or answering the question, at least from his view.

MR. ZURHELLEN: I am advised by my client not only here but beforehand that there was an indication by the other members that they had not read the thing, whether it was a no or a shaking of the head, but Mr. Feinstein confirmed to me, the person who did the affidavit, that there was an indication of a negative.

THE COURT: Beauty is in the eye of the beholder and if you are going to a meeting expecting to be annoyed at what you see, you will get annoyed by what you see.

MR. ZURHELLEN: Could be.

Transcript of Oral Argument, May 30, 1990 at 15-16.

deadlines" and determining Environmental Assessment and "all other relevant supporting documentation," a negative declaration should be issued.

On March 22, 1990, a group of Ludlow Park residents opposed to further development of the YJWTP site, the mayor of the City of Yonkers and the state assemblyman for the Ludlow Park area commenced this Article 78 proceeding in the Supreme Court of New York, County of Westchester, seeking to reverse the Board's determination. Respondents removed to this court, where the action was deemed related to the one in which the consent decree had been filed. On May 10, 1990, we determined to exercise jurisdiction pursuant to the All Writs Act, 28 U.S.C. §1651.

DISCUSSION

Under SEQRA, respondents were required to determine whether constructing a dewatering facility at YJSTP would have a "significant effect" on the environment and, if they so determined, to cause an environmental impact statement to be prepared. 6 NYCRR 617.1(c). In this Article 78 proceeding, we review respondent's determination that no such statement was required to decide whether or not it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion ..." C.P.L.R. s7803(3); Pell v. Board of Education (1974) 34 N.Y.2d 222, 230-32, 356 N.Y.S. 833, 839-40; Colton v. Berman (1967) 21 N.Y.2d 322, 329; 287 N.Y.S.2d 647, 651. We are required to conclude that the determination was proper if, in making it, respondents identified all areas of concern, took a "hard look" at the issues involved, and made a "reasoned elaboration" for the basis for their finding that the facility would have no significant environmental effects. Jackson v. New York State Urban Development Corp. (1986) 67 N.Y.2d 400, 417; 503 N.Y.S.2d 298, 305. Our role is not "to weigh the desirability of any action or choose among alternatives, but to assure that [respondents have] satisfied SEQRA, procedurally and substantively." Id.

Petitioners make four principal arguments against the respondents' determination. They contend that the Board (1) improperly based its findings on the study and the Full

Environmental Assessment rather than on reasons expressly enumerated in its resolution; (2) impermissibly took into account the deadlines established in the consent decree; (3) failed adequately to consider the effect of any additional traffic required to remove the sludge cake from the facility; and (4) did not give due deference to the fact that the Ludlow Park area has been deemed "Type I." We find these arguments to be without merit.

We follow Stewart Park and Reserve Coalition v. New York State Department of Transportation (3d Dept. 1990) 555 N.Y.S.2d 481, 484 in concluding that the Board's basing its resolution on the recommendations in the report and Environmental Assessment was entirely proper under Jackson, supra, in the absence of any indication that reliance on the engineering consultants was unreasonable.

We also see nothing improper in the resolution's recitation of the fact that the County, under the terms of the consent decree, was bound to meet certain deadlines. The Board, of course, could hardly have made its decision to construct a dewatering facility without reference to that fact.; The circumstance that, as petitioners insinuate, the deadlines in the consent decree might conceivably have provided respondents with a motive for not complying with the applicable legal standards is simply a red herring; the issue to be determined is whether or not they complied, not why they might not have complied.

Nor can we say that respondents failed to identify and take a hard look at the traffic issue. To the contrary, the Full Environment Assessment supported its conclusion that transporting the sludge cake from the facility would not result in the generation of traffic significantly above current levels with the following discussion:

The only traffic generated by the operation of the proposed facility will result from the transportation of the dewatered sludge to its disposal location and employees going to work and leaving work. Approximately six trucks per day will be required for the transportation of dewatered sludge from the YJTP to the disposal facility. Potential impacts to local traffic are expected to be insignificant based on he amount of traffic

generated as a result of two new employees and five additional truck [sic] entering and leaving the YJTP per day (Part 3, p. 11).

Petitioners insist that, by their calculations, a total of ten or twelve trucks—rather than five—will be required. Even if petitioners should turn out to have been correct in this prediction, it would not follow that the Board had arrived at its contrary determination, based on the engineers' study and the Full Environmental Assessment, arbitrarily, capriciously or in an abuse of discretion.

Finally, we note that the Ludlow Park area's designation as Type I, which was specifically noted in the Full Environmental Assessment and the negative declaration, did not command a determination that an environmental impact statement was required; it merely made such a determination "more likely." 6 NYCRR s617.11; Jaffe v. RCI Corp. (3d Dept. 1986) 119 A.D.2d 854; 500 N.Y.S.2d 427, 429. Where, as here, the County followed the appropriate procedural requirements for a Type I area, "the issue distills to whether its conclusion that the proposed project would have no significant impact on the environment is a rational one which is supported by the record." Id., citing Matter of Inland Vale Farm Co. v. Stergianopoulos (1985) 65 N.;Y.2d 718, 492 N.Y.S.2d 7. Based on our examination of the record, we find that it is.

CONCLUSION

We deny the petition.

SO ORDERED.

New York, New York
July 19, 1990

WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF THE LUDLOW PARK HOME OWNERS ASSOCIATION, HENRY SPALLONE, AS MAYOR OF THE CITY OF YONKERS and G. OLIVER KOPPELL, AS ASSEMBLYMAN FOR THE 80TH ASSEMBLY DISTRICT,

Petitioners,

90 Civ. 22543

v.

THE COUNTY OF WESTCHESTER and THE WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents.

May 10, 1990
4:15 p.m.

Before:

HON. WHITMAN KNAPP,
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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(Case called; both sides ready)

THE COURT: Good afternoon, ladies and gentlemen.

I must say there are extraordinarily good briefs on all sides and I really don't see that there's much point in arguing. You've said everything there is to be said, and I may well be in error, but I'm no longer in doubt that I should sustain the government's position that this is removable here under the All Writs Act.

It seems to me that the whole question is answered by point 4 of the petitioner's memorandum of law submitted to the Supreme Court of Westchester County and it says:

Point 4. The primary and more likely sole reason for the board of legislators' determination to dispense with an environmental impact statement was to avoid breaching an April 1990 deadline agreed to by Westchester County. This was not a permissible consideration in the board's determination as a matter of law.

Now, you just substitute the words "Agreed to by Westchester County" for the words "April 1990 deadline directed by the United States District Court for the Southern District of New York" and that is the question that is now before me and I can't think of a clearer case where this court has to decide that question.

Now, the petitioner has pointed out that in various places in the consent degree the parties are excused from acting if it is found that their conduct is in violation of state law, the decree would require them to do things in violation of state law.

Now, that was just put in there obviously at the insistence of defense counsel who were negotiating the decree to prevent the officials of Westchester County and the other defendants from finding themselves in the unhappy situation of having to elect between going to jail in New York State or in federal custody and that was not in any way intended to give the New York State Court the decision of whether they should go to jail.

And the question which a state judge would have to answer, just as I would have to answer, is to what extent is New York law preempted by the federal law. A state judge could answer that just as well as I could, maybe better. That's not the point. The point is it's my decree that has to be enforced and I have to decide questions of whether the state law is preempted

or whether it's not. Or maybe preemption is avoided. Maybe, according to state law, the existance of a federal decree, the state judge might disagree with the petitioner point that it is a permissible consideration, as a matter of state law.

In any event, that has to be decided by one court and it has to be decided by this court because it's this court's decree that has to be enforced and petitioners the deadlines in that decree were not just created by this whim of the parties or my whim, if I had anything to do with it. They were mandated by the act of Congress which this decree seeks to enforce.

Now, the law is adequately established by the Court of Appeals in the Yonkers case and the other cases cited by the respective parties and it seems to me the last thing the jurisprudence of the sate or national needs is another opinion on the subject. So, I will just make the words I have just spoken the opinion of the court, subject to anything anybody wants to say now to persuade me I was wrong.

MR. ZURHELLEN: Well, I guess that's up to me then because I'm on the losing side of your Honor's opinion. If I may, for a few minutes, I would like to address your question—

THE COURT: I look forward to your address because I was certainly impressed by your brief.

MR. ZURHELLEN: Thank you very much, your Honor.

I did my best with what little I had to work with. I confess I'm troubled and confused—and I don't mean just rhetorically—about what I consider to be the basic question presented in this application. All the parties, in so many words, seem to agree that the County of Westchester is to be bound and remain bound by state law. I'm reading from one of the briefs which I received by fax today. I think it's from the United States. Yes, it is. It says indeed the United States fully supports the proposition that Westchester should comply with state law.

I am genuinely at a loss, your Honor, to understand that if that proposition is correct, if Westchester County is to comply with state law, not with the caveat that it must also take into account or state law must take into account the effect of whatever might be decided on the consent decree, but state law, qua state law. Then I am at a loss to even articulate what this court might do in considering the Article 78 proceeding that a state court would not be bound itself to do.

THE COURT: Nothing is the answer to that question.

MR. ZURHELLEN: And if that is the answer to that question, your Honor, which I consider to be at least half the issue in this matter, then what basis can be articulated for the espoused position of the other parties in this proceeding that somehow or other the outcome of the Article 78 proceeding either has to take into account the consent decree in some fashion or that somehow the consent decree, its existence, its terms, its provisions, ought to affect the outcome of the Article 78 proceeding. Again, I want to emphasize I'm not just being rhetorical with my question. I don't understand how that could be. The position seems internally diametrically and definitionally inconsistent.

THE COURT: The simple thing is, obviously, I can be wrong. Obviously, a state judge can be wrong. Obviously, we both can be wrong. We can't have two people doing it. We have to have one person doing it and that's me.

MR. ZURHELLEN: If the state court were to decide the Article 78 proceeding.

THE COURT: The state court could decide it wrongly, I can decide it wrongly, but one person has to decide and that in the circumstances has to be me.

MR. ZURHELLEN: That I don't understand, your Honor.

THE COURT: Because my decree has to be enforced.

MR. ZURHELLEN: To what extent at all can the consent decree have an effect on the proceedings or the outcome of the Article 78 proceeding?

THE COURT: That's what the state judge would have to decide if he were deciding and that's what I'm going to have to decide when I decide it. There can't be two conflicting decisions on that question.

MR. ZURHELLEN: I agree with that.

THE COURT: And the only way we can avoid having two conflicting decisions on that question is to have one judge decide it.

MR. ZURHELLEN: I'm all for not having two judges decide and making inconsistent opinions.

THE COURT: But there's no way of stopping it except having only one judge do it.

MR. ZURHELLEN: And the notion that one judge and not two should do it does not, to me, militate that that judge be a federal judge rather than the state judge.

THE COURT: That's the issue.

MR. ZURHELLEN: That's exactly right, judge. If it's conceded, as it seems to be, that a state judge or your Honor must follow state law in determining the Article 78 proceeding and it is established I think in my papers and not denied by any of the parties that state law does not comprehend an effect on the outcome of the Article 78 proceeding because there is a federal consent decree—

THE COURT: That's not conceded. Certainly a state judge is going to have to decide whether state law—if this were to go to state court, the state judge would have to decide to what extent, if any, state law would have to yield to the injunction, federal injunction.

MR. ZURHELLEN: But even stated in those terms that becomes a matter of state law.

THE COURT: Exactly. That has to be decided by one person or else there would be chaos and chaos is what we don't like.

MR. ZURHELLEN: Rather than belabor a point that I confess it may be my failings that cause me not to understand it, I won't press the matter any further. And I don't think there's anything further to say, other than what I have said in my brief. So, thank you very much for your Honor's time.

THE COURT: I suppose I would ask the government to submit a decree and the decree should—I think I said originally when we were here before that I would grant the motion to remand and then bring it back. But I see from the way it's been done before it's simple just to keep it here.

MR. ZURHELLEN: We would not suggest that procedure be followed.

THE COURT: Also, it should enjoin the parties from taking any action in state court, not that that is necessary, but that is procedurally necessary, to be sure you have a right to appeal. You have a clear right to appeal from an injunction and if I just kept it here and didn't have an injunction there might be some doubt as to whether you could appeal. Obviously, you should have the right if you want to exercise it.

MR. ZURHELLEN: I think that would be my recommendation. To me, it's a difficult question.

THE COURT: So, the go ernment will present—

MR. SCHWARTZ: Yes, your Honor. I'll submit an order.

Your Honor, I just have a few points to mention. One, we would ask that the letter—

THE COURT: If you think there's anything else that I should say to make your appeal easier, you ask me, and if I agree with you, I'll say it.

MR. SCHWARTZ: Your Honor, we agree with the court that the essential question right now is that there should only be one judge hearing this matter and your Honor has had the consent decree in front of this court for sometime. Indeed, the predecessor matter, United States vs. Westchester, which was filed in 1979 under the Marine Protection Safe Waters Act was brought to stop ocean dumping by Westchester County and that's eleven years ago. It took an additional nine years for Congress to change the statute to make it strong enough to get to the place where we are now and the action that the government, in conjunction with the State of New York, filed last summer was under the new statute, the Ocean Dumping Banning Act. Your Honor and this court has had before it for over a decade the matters concerning Westchester's disposal of sewer sludge and now has before it the decree which demands this practice and that land disposal commence subsequent to December of 1991. As we stated in our reply papers, the United States fully supports the proposition that Westchester should comply with state law and indeed were the court to find that they did not it may well be that the remedy that your Honor would shape would be able to take into account the demands of the consent decree at the same time as taking into account the demands of state law and in our reply brief, page five, we have cited to that proposition in a state case under the state environmental statute issued in the Article 78 proceeding and we believe that the Yonkers case also supports the need for the court to be flexible in choosing a remedy.

I might note for the record that the Yonkers case itself does not in any way suggest that state law doesn't apply to the issues on that Article 78 proceeding.

The point at issue in the All Writs application is who should hear the dispute and we submit, as your Honor has found, that it is this court that should hear it.

I would ask that the letter submitted today by the National Resources defense counsel, which I believe was received by all the parties and Mr. Zurhellen received it as well, that this letter be made formally a part of the record in the event that the Ludlow Park Homeowners Association should elect to appeal.

MR. ZURHELLEN: I have no objection to that.

THE COURT: All right. That's the letter dated May 10, 1990.

MR. SCHWARTZ: From Nina Sankowitch, coastal project attorney. Perhaps I could submit it now and it could be made part of the record.

The only other matter I have to bring up concerns what happens now and I can await discussing that. I believe Westchester—

THE COURT: Does anyone else have anything to say about my order? I have no pride of authorship and you were willing to attack mine, the rest of you are willing to defend it. Does anyone think there's anything needed in the record to help you or the other side?

MS. BOWENS: I want to put on the record that the County of Westchester supports your motion in granting the United States motion under the All Writs Act. I also like to say in terms of Mr. Schwartz' concern about what happens next, as per your order the last time we were here, I have a verified answer prepared. It needs to be bound and served and that's all. But it is prepared.

THE COURT: That will be bound and served. You can serve it on the parties here.

MS. BOWENS: I can serve it tomorrow. It's too heavy to carry nine copies.

THE COURT: That will be served and filed tomorrow morning.

MR. SCHWARTZ: There is another motion pending and perhaps it might clarify the record—I think it's the government's view that your Honor need not reach that motion unless you're prepared to.

THE COURT: What motion are you referring to?

MR. SCHWARTZ: The motion that there is an alternative ground for this court to have jurisdiction over the Ludlow Park matter.

THE COURT: It seems to me that has become moot. The petitioner doesn't object to just leaving it here on the understanding that if If should be reversed the Court of Appeals would undoubtedly remand it. That doesn't need to have a motion remanding it and coming back. I thought originally the motion removing it here was not meritorious and we would have to remand it and bring it back. Everybody agrees that's nonsense.

MR. SCHWARTZ: The Yonkers case supports the proposition that that's not necessary.

MR. ZURHELLEN: As a matter of procedure, just so it's clear, I happen to agree with that. As long as it's clear also in the event we do appeal that our rights regarding that motion are preserved for appeal.

THE COURT: That's right. It's conceivable the court of appeals might find I was wrong in thinking there was no ground for removing it here except for the writ. In that event it would stay here on the original motion. If the Court of Appeals agrees that I'm right on that but I'm wrong on what I have ruled, it will go back. It will go wherever the court of appeals thinks it ought to go.

Well, then, assuming you file your answer tomorrow, as I understand New York practice—the question before me—is there any evidentially hearing necessary or can I decide it on the papers?

MR. ZURHELLEN: I think that's almost correct, but not quite, your Honor. Under state procedure, I believe given the form of the notice of the petition we filed we are entitled to a period of time, I believe seven days, after service of their answer or some period of time within which to reply to it, if we deem it necessary.

MR. SCHWARTZ: Your Honor, I'm not sure that it is correct that New York State procedural rules apply once the matter—

THE COURT: I said I thought we ought to apply them. It seems to me we have enough confusion. We have an Article 78

proceeding. It seems to me we ought to proceed in that proceeding under state rules and then we'll know where we're at. That seems the most sensible way to do it.

MR. ZURHELLEN: Let me perhaps make the following suggestion: If the answer is to be served on Friday, tomorrow, then could it be agreed, notwithstanding everybody researching what state law exactly provides, that I have an opportunity until the end of next week within which to file whatever responsive papers I feel appropriate.

THE COURT: That seems to be reasonable. Anybody object to that?

MR. ZURHELLEN: To address the merits or at least what happens next in terms of a hearing or not. If your Honor feels the papers provide sufficient authority for you to make a decision one way or another, then that's your Honor's prerogative.

THE COURT: Why don't we set it down fro 4:30 on Tuesday, a week from Tuesday.

MS. BOWENS: Your Honor, could you clarify for what purposes it would be set down a week from Tuesday?

THE COURT: A week from Tuesday arguing—both sides I say will either argue that they should have some evidence taken or that they won't. It will be the argument on whether or not I can dispose of the Article 78 proceeding on the papers before me and, if so, whoever thinks I can, will argue that I should dispose of it. Maybe everybody will agree that I can act on the papers before me. We'll have different views as to how I should act. Maybe one party will think there ought to be an evidentiary hearing. The other party will not think so and I'll decide whatever questions there are to decide.

Tuesday is a bad day. Wednesday the 23rd.

MR. SCHWARTZ: Your Honor, may I interject here for a moment? As things currently stand neither the United States or the State of New York are parties in the Article 78 proceeding. They are before your Honor as related case. There are no motions to intervene pending at this juncture. The United States is currently considering whether or not we will, indeed, wish to formally intervene in that proceeding. Conceivably other parties may also wish to intervene in that. In the interest

of resolving that issue, I would suggest respectfully after Mr. Zurhellen's responsive papers to the county's papers are submitted, perhaps, a week should be enough for the United States, perhaps the state of New York, to consider whether we wish to be heard on any of the issues raised on the merits in that proceeding.

THE COURT: So, you want the hearing adjourned a week?

MR. SCHWARTZ: No more than a week.

THE COURT: The 30th at 4:30. At that point, if I can decide the case on what's before me, I'll decide it. I may not decide it on that day, but I'll take it under advisement. If I decide we have to have an evidentiary hearing, we'll schedule it. The whole idea is to get the thing done as fast as we can. Is there anything else to be done today?

MS. BOWENS: Your Honor, I just want to clarify how long the petitioners have to reply.

MR. ZURHELLEN: Friday of next week.

THE COURT: Friday of next week.

Okay. I again wish to express my appreciation for the professional conduct of everybody involved.